

No. PD-1229-16

TO THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
2/10/2017  
ABEL ACOSTA, CLERK

ERNESTO LERMA,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Nueces County

\* \* \* \* \*

STATE'S MERITS BRIEF

\* \* \* \* \*

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## **IDENTITY OF JUDGE, PARTIES, AND COUNSEL**

- \* The parties to the trial court's judgment are the State of Texas and Appellant, Ernesto Lerma.
- \* The trial Judge was the Hon. Missy Medary, 347th District Court.
- \* Trial counsel for the State was David Patrick Jakubowski, 901 Leopard, Room 206, Corpus Christi, Texas 78401.
- \* Counsel for the State before the Court of Appeals was Doug Norman, 901 Leopard, Room 206, Corpus Christi, Texas 78401.
- \* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.
- \* Counsel for Appellant at trial and on appeal was Celina Lopez Leon, 5151 Flynn Parkway, Suite 616, Corpus Christi, Texas 78411.

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Appeal from Nueces County

\* \* \* \* \*

**STATE’S BRIEF ON THE MERITS**

\* \* \* \* \*

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully presents her Brief on the Merits.

**STATEMENT REGARDING ORAL ARGUMENT**

The State did not request oral argument, and the Court did not grant it.

## STATEMENT OF THE CASE

Appellant filed a pretrial motion to suppress cocaine found during a traffic stop of a car in which he was a passenger. The trial court denied the motion, and Appellant pled guilty to second-degree felony possession of a controlled substance and was sentenced to twenty five years' imprisonment. The court of appeals reversed the suppression ruling. It held that the officer's pre-arrest frisk of Appellant, made during an unjustifiably prolonged stop, was not supported by reasonable suspicion. *Lerma v. State*, No. 13-15-00417-CR, 2016 Tex. App. LEXIS 10146 (Tex. App.—Corpus Christi Sept. 15, 2016) (substitute opinion and judgment) (not designated for publication).

## ISSUE PRESENTED

**When the cocaine was seized after Appellant attempted to flee a reasonably timed traffic-stop-detention, does an alleged unlawful pre-arrest frisk and prolonged detention render the cocaine inadmissible?**

## SUMMARY OF THE ARGUMENT

The court of appeals erred to hold that the seizure of cocaine pursuant to a search-incident-to-arrest was tainted by an alleged unlawful frisk during a unjustifiably prolonged detention. The cocaine was seized after Appellant fled a lawful detention that began with a traffic stop. At that time, the officer was uncertain about issuing the driver a citation and had discovered another violation involving an

unrestrained baby-passenger. Thereafter, Appellant was legally ordered out of the car, asked to identify himself, and investigated for providing a false identification and suspected marijuana use and possession. When the officer retrieved a bag of synthetic marijuana from Appellant's pocket, he immediately fled. After he was captured and arrested, the cocaine was discovered. Because of the absence of any unlawful taint-worthy conduct by the officer, the court of appeals erred to reverse the trial court's denial of the motion to suppress.

### **FACTS**

Patrol Officer Javier Lolando Salinas, Jr., conducted a stop for a traffic violation. 1 RR 20-21; State's Exhibit A, Title 1 (dash-cam video). Appellant was the front-seat passenger, and a woman holding a baby in her lap was in the back. 1 RR 22.

While Salinas interacted with the driver at the passenger's side window, he observed that Appellant was nervous, moving his feet around, trying to reach into his pocket, and putting his hands between the seats. 1 RR 25-26, 36, 41. Salinas ordered Appellant out of the car. 1 RR 26-27; State's Exhibit A at 3:10. Salinas asked Appellant if he had any weapons on him, and Appellant said, "No." State's Exhibit A at 3:30-35. Salinas then told Appellant to face the car so he could pat him down "real quick." 1 RR 44; State's Exhibit A at 3:35. As Salinas explained that he



wanted to make sure Appellant did not have any weapons, Appellant interrupted and told Salinas that he had a knife in his pocket. 1 RR 43, 52; State's Exhibit A at 3:35-40. When Appellant went to remove it, Salinas said he would do it. State's Exhibit A at 3:40-42. Salinas tossed the knife in the front passenger's side of the car. 1 RR 44; State's Exhibit A at 3:43-46. Salinas had felt a pack of cigars and a plastic bag containing a soft substance while retrieving the knife. 1 RR 27-28, 45. The cigars, in Salinas' experience, are commonly used to roll synthetic marijuana. 1 RR 29-31. He was not certain but suspected that Appellant had narcotics. 1 RR 30, 45. Salinas did not alert Appellant of his suspicions because he was alone and concerned Appellant would run or fight. 1 RR 30, 48.

Appellant did not have an identification card but told Salinas his name was Bobby Diaz. 1 RR 26, 32; 3:09, 3:29, 4:15-17, 5:33-40. With a back-up officer then on the scene, Salinas returned to his patrol car and ran a check through TCIC and NCIC to verify Appellant's identity and make sure he did not have any warrants. 1 RR 32; State's Exhibit A at 6:35. After learning that Appellant's physical description did not match the one for Bobby Diaz, Salinas returned and asked Appellant when he last smoked marijuana. 1 RR 32; State's Exhibit A at 8:39-9:08. He told Appellant that he could smell it all over him, and he wanted to determine whether it was on

Appellant's person or emanating from his pockets.<sup>1</sup> State's Exhibit A at 8:39-9:08. Appellant stated he had smoked some synthetic marijuana and possessed some. 1 RR 33, 52; State's Exhibit A at 9:04-18. Salinas removed the synthetic marijuana from Appellant's pocket, handed it to the other officer, and Appellant took off running. 1 RR 33; State's Exhibit A at 9:49-56. Salinas caught and arrested him. 1 RR 34; State's Exhibit A at 10:27. Salinas seized more synthetic marijuana and the cocaine at issue from Appellant. 1 RR 35.

## **ARGUMENT**

### **1. The cocaine was seized after flight during a lawful detention.**

The court of appeals erred to conclude that seizure of cocaine pursuant to Appellant's arrest following Appellant's flight from the scene was tainted by an earlier alleged unlawful frisk. The pre-arrest frisk, even if unlawful, is entirely separate from the legality of the arrest despite being part of the same narrative. The cocaine was not seized during the pre-arrest frisk; it was seized after Appellant fled. The relevant events leading up to the cocaine seizure were lawful.

Salinas' demand that Appellant get out of the car was valid. *See Maryland v.*

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<sup>1</sup> Appellant takes issue with this fact, stating, "Officer Salinas never testified that Respondent smelled of marijuana, nor did he state such in the video." *See Appellant's Response to State's Petition for Discretionary Review*, at 9-10. However, this is contrary to the record and the court of appeals' rendition of the facts. *Lerma*, 2016 Tex. App. LEXIS 10146, at \*6.

*Wilson*, 519 U.S. 408, 415 (1997) (police may order passengers to get out of a vehicle during a traffic stop). And Salinas’ inquiry into Appellant’s identity was legitimate,<sup>2</sup> as was his follow-up questioning when he discovered Appellant gave a false name. TEX. PENAL CODE § 38.02 (offense of failure to identify upon request or intentionally provide false information when detained). Salinas was entitled to determine Appellant’s true identity after Appellant made it an issue by providing a false name. And during this time, Appellant was not free to leave or “move about at will” absent evidence that Salinas granted him permission to do so. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (“a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with police and move about at will.”). Therefore, Appellant’s flight from that lawful detention—by virtue of the traffic stop and relaying a false identification while detained—constituted an offense. TEX. PENAL CODE § 38.04(a).<sup>3</sup> His apprehension by Salinas was supported by probable

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<sup>2</sup> See *United States v. Fernandez*, 600 F.3d 56, 61 (1st Cir. 2010) (inquiry into passenger’s identity is permissible); *United States v. Soriano-Jarquin*, 492 F.3d 495, 500-01 (4th Cir. 2007) (same); *United States v. Rodriguez-Hernandez*, 353 F.3d 632, 635 (8th Cir. 2003) (same); *United States v. Purcell*, 236 F.3d 1274, 1277-78 (11th Cir. 2001) (a request for identification and a subsequent check of the occupants’ criminal history constitute steps “reasonably necessary to protect [officers’] personal safety.”).

<sup>3</sup> “A person commits an offense if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him.” TEX. PENAL CODE § 38.04(a).

cause that Appellant committed a crime.<sup>4</sup> Thus, the post-frisk arrest was lawful. *See Matthews v. State*, 431 S.W.3d 596, 605 (Tex. Crim. App. 2014) (post-frisk detention was not unreasonable because flight from lawful detention, supported by reasonable suspicion, constituted its own offense). And it was during this second, separate detention that Salinas found the cocaine. 1 RR 35.

## **2. Prolonged detention is a red herring.**

The court of appeals further erred to conclude that the stop was unduly prolonged. *Lerma*, 2016 Tex. App. LEXIS 10146, at \*19. First, Salinas' investigation into the initial traffic offense was one among many tasks to be performed during the stop. A traffic stop is not complete until the "tasks tied to the traffic infraction have been—or reasonably should have been—completed." *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015). Legitimate inquiries during a stop include: checking registration, proof of insurance, verifying a driver's identification and license status, and determining whether there are outstanding warrants. *Id.* In the past, this Court has explained, "It is only after . . .this computer

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<sup>4</sup> Additionally, Salinas was authorized to arrest Appellant for the offense of failure to identify, *see* TEX. PENAL CODE § 38.02(c), (d) (punishment range from Class A to Class B misdemeanor), or the subsequent offense of possession of synthetic marijuana for the bag seized before his flight. *See* TEX. HEALTH & SAFETY CODE § 481.1031(b)(3), *effective* Sept. 1, 2011. *See also* TEX. CODE CRIM. PROC. art. 14.01(b) ("A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.").

check is completed, and the officer knows that this driver has a currently valid license, no outstanding warrants, and the car is not stolen, that the traffic-stop investigation is fully resolved.” *Kothe v. State*, 152 S.W.3d 54, 63-64 (Tex. Crim. App. 2004). Unrelated checks are permissible but cannot unreasonably extend the duration of the stop absent reasonable suspicion. *Id.* Even though Salinas had completed his investigation into the traffic offense, he was undecided about issuing the driver a citation. 1 RR 39-40, 55; *Rodriguez*, 135 S. Ct. at 1516 (deciding whether to issue a citation is part of the mission of stop based on a traffic violation). Next, the permissible and necessary tasks were not complete when Salinas turned his attention to Appellant and began interacting with him exclusively. 1 RR 39-40, 55. Salinas had not yet verified the driver’s identification and license status or determined whether he had any outstanding warrants. *See Kothe*, 152 S.W.3d at 63-64.

Further, Salinas had observed another violation in plain view at the stop’s inception—the unrestrained baby.<sup>5</sup> 1 RR 22, 55. Salinas was obligated to address and remedy this secondary offense before allowing the driver to leave. *See*

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<sup>5</sup> Texas Transportation Code Section 545.412(a) provides:  
A person commits an offense if the person operates a passenger vehicle, transports a child who is younger than eight years of age . . . and does not keep the child secured during the operation of the vehicle in a child passenger safety seat system according to the instructions of the manufacturer of the safety seat system.

*Rodriguez*, 135 S. Ct. at 1615-16 (highway safety includes prudent and responsible vehicle operation; thus, such measures are incident to a stop). And that is exactly what happened. After Appellant was arrested, seated in the patrol car, and properly identified, Salinas resumed his interactions with the driver and woman and was able to arrange a car seat for the baby before allowing them to leave.<sup>6</sup> State's Exhibit A at 2:02-3:25, 10:27-27:51; 28:07-09.

Next, during this time, Salinas was authorized to require Appellant to identify himself and then further detain Appellant to investigate his identity upon discovering it was false. *See* TEX. PENAL CODE § 38.02. Likewise, at this point, Salinas also acquired reasonable suspicion that Appellant was under the influence of marijuana and possibly possessed it because he could smell it on Appellant. Therefore, Appellant's false identification and possible drug use and possession provided Salinas with probable cause to investigate and perhaps arrest Appellant for the newly ascertained separate offenses.<sup>7</sup>

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<sup>6</sup> Appellant characterizes this circumstance as a pretext. *See* Appellant's Response to State's Petition for Discretionary Review, at 8-9 (filed November 2, 2016). Even if it was, Salinas' subjective intent is irrelevant. *Crittenden v. State*, 899 S.W.2d 668, 671 (Tex. Crim. App. 1995). The applicable standard is objective and therefore focuses on what a reasonable officer would believe or do based on the surrounding circumstances. *Id.*

<sup>7</sup> *See* TEX. CODE CRIM. PROC. art. 14.01(b).

### 3. *St. George v. State* is not on point.

The court of appeals erred to rely on this Court's decision in *St. George v. State*. There, an officer continued to question St. George, the vehicle's only passenger, after the other officer issued the driver a citation. 237 S.W.3d 720, 722 (Tex. Crim. App. 2007). The officer asked him his name and date of birth multiple times and told him that he would not let them leave until St. George complied. *Id.* This Court held that the continued questioning was non-consensual and that the officer lacked reasonable suspicion to believe that St. George was involved criminal activity. *Id.* at 726. Therefore, questioning him post-citation exceeded the scope of the stop and unnecessarily prolonged the detention.<sup>8</sup> *Id.*

As shown above, the legitimate tasks associated with the stop here were not complete when Salinas began interacting with Appellant. Salinas was undecided about issuing a citation, and he discovered an unrestrained baby in the car. Salinas lawfully required Appellant to exit the car and identify himself. He discovered the

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<sup>8</sup> If *St. George* were decided today, this Court would likely reach a different result. Because the officers found outstanding warrants for St. George, his arrest and the subsequent discovery of drugs would have been lawful, regardless of any prolonged detention preceding the discovery of the warrants and search-incident-to-arrest. See *State v. Jackson*, 464 S.W.3d 724, 732-33 (Tex. Crim. App. 2015) (valid arrest warrant attenuated the illegal use of a GPS tracking device). *St. George* also placed undue importance on the issuance of a citation, stating that it terminated the detention regardless of any other aspects of "the mission."

identification given was false and had probable cause to believe that Appellant was under the influence of marijuana or possessed it. Appellant fled after he was confronted and admitted to using and possessing synthetic marijuana. Salinas arrested him and discovered the cocaine. Salinas' questioning and actions did not exceed the scope of the stop and were supported by later-acquired probable cause of other violations.

#### **4. Conclusion**

For the reasons explained above, the seizure of cocaine conducted pursuant to Appellant's arrest following his flight is in no way tainted by any alleged unlawful weapons frisk or prolonged detention.



## **PRAYER FOR RELIEF**

The State prays that the Court of Criminal Appeals reverse the court of appeals' decision reversing the trial court's denial of Appellant's motion to suppress and reinstate the trial court's judgment.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,264 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

*/s/ Stacey M. Soule*  
State Prosecuting Attorney

## **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the State's Brief has been served on  
February 10, 2017, via email or certified electronic service provider to:

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